

Boston College Law School

Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

7-21-2020

Trilogy of Supreme Court Cases Highlight Deficiencies in Anti-Robocall Statute

Daniel A. Lyons

Boston College, daniel.lyons.2@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lfp>



Part of the [Communications Law Commons](#), [Consumer Protection Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Daniel A. Lyons. "Trilogy of Supreme Court Cases Highlight Deficiencies in Anti-Robocall Statute." *Free State Foundation Perspectives* 15, no.40 (2020).

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.



Perspectives from FSF Scholars
July 21, 2020
Vol. 15, No. 40

**Trilogy of Supreme Court Cases
Highlight Deficiencies in Anti-Robocall Statute**

by

Daniel A. Lyons *

I. Introduction and Summary

While the Federal Communications Commission carries a diverse policy portfolio, one issue in particular remains at the top of consumers' collective mind year after year: reducing the number of unwanted robocalls. By one measure, 54.6 billion spam calls were placed to American mobile phones in 2019 – that's 4.5 billion each month, or approximately 14 calls monthly for each man, woman, and child in the United States.¹ The FCC reports that unwanted calls generate 60 percent of all consumer complaints that the agency receives each year.²

Robocalls have even become pernicious and pervasive enough to draw the Supreme Court's attention. Earlier this month, the Court decided *Barr v. American Association of Political Consultants, Inc.* In that case, the Court struck down a portion of the Telephone Consumer Protection Act (TCPA), a 1991 statute intended to protect consumers from robocalls, because it violated the First Amendment.³ Three days later, the court granted certiorari in a second case, *Facebook, Inc. v. Duguid*, which involves interpretation of an ambiguous statutory definition within the TCPA.⁴ These follow on the heels of a third case, *PDR Network LLC v. Carlton &*

Harris Chiropractic Inc., which was decided last year and involved a conflict between the FCC and the judiciary about a different TCPA provision.

While the three cases come in very different postures, all are in some way wrestling with the statutory text – text that was awkward when written thirty years ago and has grown increasingly problematic over time. As technology advances and the world has grown ever more connected, the TCPA has proven increasingly incapable of solving the robocall problem. Today’s robocalls often originate overseas and present as disguised numbers, meaning that the TCPA’s private right of action offers little deterrence against the rising tide of unwanted calls. Yet the act’s ambiguous and outdated language has nonetheless driven an explosion in litigation against companies far from the telemarketers Congress targeted. Much of this litigation has been brought by creative trial lawyers who stretch the likely meaning of the statute in ways that defy common sense and undermine consumer protection.

Recent FCC initiatives have shown the possibility of technical solutions to the robocall problem. Initiatives such as default call blocking, better call authentication through the STIR/SHAKEN framework, and targeting of gateway providers as the entry points for foreign robocalls represent efforts to identify and eliminate the drivers of modern robocalls. Congress should update the TCPA to reflect the realities of the modern telecommunications marketplace, and consider focusing on technological solutions, rather than litigation, to protect American consumers.

II. The Telephone Consumer Protection Act of 1991

Though technological advances have exacerbated the problem, unwanted telephone calls are not a new phenomenon. Nearly thirty years ago, consumers complained about the rise in calls by telemarketers who used automatic dialing equipment to deliver pre-recorded messages via telephone.⁵ As Senator Fritz Hollings put it on the Senate floor, “[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”⁶ In response, Congress passed the Telephone Consumer Protection Act, which (as Hollings, a bill sponsor, explained) was “purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country – the telemarketing calls placed to the home.”⁷

The TCPA placed significant limitations on outbound calls. Among other restrictions, it prohibits the use of an “automatic telephone dialing system” (or autodialer) to call wireless phones or any service for which the called party is charged for the call.⁸ The law also prohibits calls to residential lines using an artificial or prerecorded message unless the called party has consented to the call, or the call is made for emergency purposes,⁹ and limits unsolicited advertising by fax machine.¹⁰ Importantly, while Congress gave the FCC authority to implement the act,¹¹ it also created a private right of action: recipients of an illegal call may receive \$500 in statutory damages, which can be tripled if the violation was willful or knowing.¹²

III. The Supreme Court's TCPA Trilogy

A. PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.

The decades-old statute was hardly a model of good legal draftsmanship even at the time it was written. And while technological advances have exacerbated the statute's obsolescence, it was one of the more arcane provisions that first drew the Supreme Court's attention in late 2018. PDR Network, LLC, produces the Physicians' Desk Reference, a manual that compiles the uses and side effects of prescription drugs.¹³ The book is distributed to health care providers for free, funded by pharmaceutical companies that pay to include their products in the manual.¹⁴ In 2013, PDR Network announced that it would publish a new e-book version of the manual, and notified physicians via fax how to reserve a copy for free.

One of the recipients, Carlton & Harris Chiropractic, brought a class action alleging that the message violated the TCPA's prohibition on unsolicited fax advertisements. The statute defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."¹⁵ This would seemingly exclude the PDR fax, which provided an informational resource for free and offered nothing for sale or purchase to recipients. This was the conclusion of the district court, which dismissed the case.¹⁶ But the court's rationale clashed with an earlier FCC order stating that faxes that "promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements" because "free publications are often part of an overall marketing campaign to sell property, goods, or services."¹⁷

The Supreme Court's decision did not resolve this ambiguity. Rather, it addressed an ancillary legal question raised by this confluence of events: whether the Hobbs Act required the district court to adopt the FCC's interpretation.¹⁸ The Hobbs Act grants the courts of appeals exclusive jurisdiction to determine the validity of FCC final orders.¹⁹ Carlton & Harris Chiropractic argued that this provision required the district court to follow the interpretation in the FCC order. But the court remanded for consideration of whether the FCC order was a legislative or merely interpretative rule, and whether PDR Network had "prior" and "adequate" opportunity to seek judicial review of that order.²⁰ Four justices concurred in the judgment, and would have found that the Hobbs Act does not bar a defendant from challenging the agency's prior interpretation in an enforcement action.²¹ Justices Thomas and Gorsuch went further, to suggest that such a broad reading of the Hobbs Act might be an unconstitutional infringement on the judicial power.²²

B. Barr v. American Ass'n of Political Consultants, Inc.

The Court's second foray into TCPA litigation stems from Congress's questionable effort to exempt the government's interests from the statute. In 2015, the Bipartisan Budget Act created an exemption from the TCPA for calls "made solely to collect a debt owed to or guaranteed by the United States."²³ The plaintiffs sought to make robocalls not to collect government debt but to solicit for political purposes, such as conducting polls, asking for donations, and organizing get-out-the-vote efforts.²⁴ They argued that the government-debt exemption favored some speech

over others in violation of the First Amendment, and thus the court should strike down the robocall ban entirely.²⁵

The Supreme Court rejected this too-cute-by-half ploy, though its opinion was surprisingly fractured. Justice Kavanaugh's plurality opinion found that the statute favored some speech over others on the basis of content, and therefore the strict scrutiny standard applied on judicial review.²⁶ Because the government could not identify a compelling government interest, as required by the strict scrutiny standard, the government debt ban was unconstitutional.²⁷ But rather than striking the statute entirely, the plurality severed the government debt exception from the rest of the statute, which corrected the constitutional infirmity.²⁸ Justices Gorsuch and Thomas agreed that the government debt ban failed to satisfy strict scrutiny but would not have severed it.²⁹ Justices Breyer, Kagan, and Ginsburg would have found that, because speech relating to collection of debt is commercial speech, the government debt exemption was subject to the less strict intermediate scrutiny standard. They would have upheld it, but nonetheless they agreed with the plurality's severability analysis.³⁰ And Justice Sotomayor would have found the statute failed intermediate scrutiny but supported severability.³¹

Thus, the box score read 6-3 that Congress impermissibly favored government debt collection over other speech, and 7-2 that the appropriate remedy was to sever the exemption. "As a result," said Justice Kavanaugh, "plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech."³²

C. Facebook, Inc. v. Duguid

Though the first two cases dealt with constitutional questions, the most recent TCPA case, which involves a matter of statutory interpretation, has the potential to be the Court's most consequential. Like many tech companies, Facebook uses text messages to alert its users of potential security risks, such as when an account is accessed from an unrecognized browser.³³ Noah Duguid alleges that he received multiple such notifications from Facebook via text, even though he does not have a Facebook account.³⁴ Duguid filed a class action arguing that Facebook used an autodialer to send a message to his wireless phone without his consent in violation of the TCPA.³⁵

Facebook's potential liability turns on the convoluted statutory definition of an autodialer. Under the statute,

[t]he term "automatic telephone dialing system" means equipment which has the capacity—
(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
(B) to dial such numbers.³⁶

The key question that the Court must address is how to parse the first prong of this awkwardly-worded definition. Does the phrase "using a random or sequential number generator" modify both "store" and "produce," or only the latter verb? The Ninth Circuit held that it modified only "produce":

To clarify any ambiguity, we rearticulated the definition of an ATDS: “equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically.”³⁷

This means that any device that has the capacity to store telephone numbers and dial them constitutes an impermissible autodialer – including Facebook’s notification system, as alleged by Duguid.³⁸

While this seems like the type of esoteric minutiae that only professors and other telecom law nerds could appreciate, the ramifications of this holding are significant. Under the Ninth Circuit’s interpretation, the potential scope of TCPA liability is breathtaking. Thousands of companies notify customers by phone of suspicious account activity, using automated messages to numbers preprogrammed and stored for use in the event of a security incident. Moreover, two-factor authentication, using a telephone number to confirm a user’s identity, is the gold standard for identity verification. Anytime such a system maps the wrong number to an account, as is alleged in *Duguid* – perhaps due to input error, or perhaps because a number has changed hands since the account was created – the company could face liability, which deters use of some of the most effective cybersecurity tools.

But the potential harm goes far beyond data security. As Facebook argued (and the Ninth Circuit seemingly acknowledged), every smartphone “has the capacity to store telephone numbers” and “dial such numbers.”³⁹ That would mean that every smartphone is an autodialer – and every smartphone owner is a potential TCPA tortfeasor. This is important because one need not actually make an automated robocall to run afoul of the statute. The TCPA makes it unlawful “to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system” to, inter alia, wireless phone numbers.⁴⁰ The statute focuses on *whether* an autodialer was used, not *how* it was used. As courts have explained, “a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”⁴¹ If a smartphone counts as an autodialer, then *any* call from a smartphone – even a traditional, live voice call – to a wireless number violates the statute, absent consent or emergency.

Despite this absurdity, it is difficult to predict how the Supreme Court will resolve this case. On the one hand, as the D.C. Circuit has mused, “[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.”⁴² In addition to the practical consequences of its ruling, there is some textual evidence that undermines the Ninth Circuit’s ruling. Congress placed a comma between the phrase “store or produce telephone numbers to be called” and “using a random or sequential number generator,” which suggests the latter phrase is meant to modify the entirety of the former.

On the other hand, the alternative reading proposed by Facebook also makes little sense: number generation and number storage are different activities, so it makes little sense to describe a device with the capacity “to store telephone numbers...using a random or sequential number

generator.” A clause delineating prohibited methods of number generation is more closely linked to the act of producing a number than storing it.⁴³ A textualist court could stress the relationship between the words “generator” and “produce” to uphold the Ninth Circuit’s reading of the statute, despite the consequences.

IV. The Obsolescence of the TCPA

While few if any statutes are free from ambiguity, the Supreme Court’s trilogy of TCPA cases highlights the multitude of problems presented by this statute in particular. Many provisions, such as the unsolicited fax provision in *PDR Network* and the autodialer definition at issue in *Duguid*, were poorly written when passed. As *Duguid* demonstrates, these difficulties have grown over time, as the fax machines and landlines that animated the statute have diminished in use, replaced by innovative new technologies that fit poorly into the analog-era statutory framework. And even when Congress does try to speak clearly, as it did in the 2015 amendment to the TCPA, the *Barr* decision shows the potential mischief that can occur when trying to legislate in the communications field in a way that passes constitutional muster.

But even these cases only scratch the surface of the TCPA’s obsolescence. On a more fundamental level, the act – and in particular its central enforcement mechanism, the private right of action – is doing little to solve the robocall problem. Americans receive billions of unwanted calls each year, and the number is rising. The FCC acknowledges that the vast majority of these robocalls violate the TCPA.⁴⁴ But the statute is powerless to stop them, because they largely originate offshore and are anonymized. The tremendous reduction in the cost of communication in the digital age, coupled with the development of technology to disguise a caller’s identity, has allowed the foreign robocall industry to flourish in way that the statute’s sponsors could never have imagined. Because of the difficulties involved with finding these perpetrators and bringing them to justice in U.S. courts, these entities are effectively judgment-proof: the threat of litigation is simply not a deterrent to their irritating activities.

In the meantime, courts are increasingly burdened by litigation abuse by creative lawyers who stretch the statute in ways the sponsors equally could not have imagined. According to WebRecon, TCPA filings have exploded in the last decade, growing tenfold from 351 cases in 2010 to 3267 in 2019 (and that figure is down from the high of 4638 cases in 2016).⁴⁵ Despite the COVID-19 pandemic, 1911 cases have been filed between January and May 2020.⁴⁶ Given the average settlement of a TCPA class action is roughly \$6.6 million, it’s no surprise that it’s drawing the attention of plaintiffs’ bar. But many of these cases aren’t brought against robocallers, but legitimate businesses that Congress never sought to target.

Then-Commissioner Ajit Pai chronicled one case against the Los Angeles Lakers who offered fans a chance to text a message to the team to be placed on the Jumbotron. When the Lakers acknowledged receipt of each message with a text indicating that not all messages would be selected, they were sued for violating the statute.⁴⁷ In 2018, the *Philadelphia Inquirer* featured a 21-year-old who made a career of manufacturing TCPA suits, through such deceptive practices as placing an order, freezing his credit card payment so the company would call back, and then suing for an unsolicited automated call.⁴⁸

More recent experience suggests that technology, rather than litigation, offers a more effective remedy for modern robocalls. In 2019, the FCC clarified that despite their obligations as common carriers, telephone companies could block calls, based on reasonable analytics, as a default position for customers, which allowed consumers easier access to call-blocking technology.⁴⁹ In conjunction with Congress, the agency shepherded the adoption of the STIR/SHAKEN framework, which improves caller ID authentication and makes it more difficult for a calling party to disguise its identity.⁵⁰

And in response to the spike in robocall traffic during the COVID-19 pandemic, the government pioneered an innovative public-private partnership that targeted the gateway providers that serve as “middlemen” connecting overseas robocalls to American telephone numbers. These gateway providers, identified as robocall importers based on call volume and traffic patterns, were given 48 hours to stop importing illegal robocalls. If they failed to do so, American carriers were permitted to block *all* traffic coming from the offending network.⁵¹ Unlike TCPA lawsuits, these technical measures target the specific factors that have helped robocalls proliferate – the ease of connecting international calls and the ability to disguise the calling party.

V. Conclusion

Justice Scalia once described the 1996 Telecommunications Act as “not a model of clarity” but instead “in many important respects a model of ambiguity or indeed even self-contradiction.”⁵² The same certainly could be said for the TCPA. Like the local telephone company provisions of the 1996 Act, the TCPA has outlived its usefulness and is ripe for revision. Its continued existence in its current form creates more harm than good, as trial lawyers wield it against legitimate businesses that Congress never intended to punish. Regardless of the outcome of the *Duguid* case, Congress should revisit the act and update its twenty-nine-year-old definitions to reflect the modern telecommunications marketplace. At a minimum, it should eliminate the relatively ineffective private right of action and instead continue the modern trend of technology, rather than litigation, as our primary tool in the fight against illegal robocalls.

* Daniel A. Lyons, a Professor at Boston College Law School, is a Member of the Free State Foundation's Board of Academic Advisors. The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

¹ Hiya, State of the Call End of Year Report 2019, available at <https://hiya.com/state-of-the-call>.

² See FCC, The FCC's Push to Combat Robocalls & Spoofing, available at <https://www.fcc.gov/spoofed-robocalls> (2018 statistics).

³ *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631 (decided July 6, 2020).

⁴ *Facebook, Inc. v. Duguid*, No. 19-511 (cert. granted July 9, 2020).

⁵ *Barr*, supra note 3, at 2.

⁶ 137 Cong. Rec. S9840-02 (July 11, 1991) (Sen. Fritz Hollings, D-SC).

⁷ *Id.*

⁸ 47 U.S.C. § 227(b)(1)(A).

⁹ *Id.* § 227(b)(1)(A).

¹⁰ Id. § 227(b)(1)(C). The act also prohibits automated calls to emergency lines, hospital rooms, pagers, or any other service for which the recipient is charged for the call, and bans the use of automatic telephone dialing systems to engage two or more of a business’s lines simultaneously. Id. § 227(b).

¹¹ Id. § 227(b)(1)(D).

¹² Id. § 227(b)(3). Plaintiffs may seek actual damages in lieu of statutory damages.

¹³ *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S.Ct. 2051, 2053-54 (2019).

¹⁴ Id. at 2054.

¹⁵ 47 U.S.C. § 227(a)(5).

¹⁶ *PDR Network*, 139 S.Ct. at 2054; see *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC.*, 2016 WL 5799301 (S.D. West Va. Sept. 30, 2016) at *2.

¹⁷ In re Implementing the Telephone Consumer Protection Act of 1991, 21 FCC Rcd. 3787, 3814 (2006); see *PDR Network*, 139 S.Ct. at 2054.

¹⁸ *PDR Network*, 139 S.Ct. at 2055.

¹⁹ Id.; see 28 U.S.C. § 2342(1).

²⁰ *PDR Network*, 139 S.Ct. at 2055-56.

²¹ Id. at 2057 (Kavanaugh, J., concurring in the judgment).

²² Id. at 2056 (Thomas, J., concurring in the judgment).

²³ 47 U.S.C. § 227(b)(1)(A)(iii).

²⁴ See *Barr v. American Ass’n of Political Consultants, Inc.*, __ S.Ct. __ (slip op. July 6, 2020) at 1-2 (opinion of Kavanaugh, J.); see also *Am. Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 161 n.1 (4th Cir. 2019) (detailing plaintiffs’ activities).

²⁵ *Barr*, slip op. at 2 (opinion of Kavanaugh, J.).

²⁶ Id. at 9.

²⁷ Id.

²⁸ Id. at 22.

²⁹ Id. at 1 (Gorsuch, J., concurring in part and dissenting in part).

³⁰ Id. at 1 (Breyer, J., concurring in part and dissenting in part).

³¹ Id. at 1 (Sotomayor, J., concurring in the judgment).

³² Id. at 1 (opinion of Kavanaugh, J.).

³³ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1150 (9th Cir. 2019).

³⁴ Id.

³⁵ Id.

³⁶ 47 U.S.C. 227(a)(1).

³⁷ *Duguid*, 926 F.3d at 1150 (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)).

³⁸ See id. at 1151.

³⁹ Id.

⁴⁰ 47 U.S.C. § 227(b)(1)(A).

⁴¹ *Satterfield v. Simon & Schuster*, 569 F.3d 946, 951 (9th Cir. 2009); see also *Nelson v. Santander Consumer USA, Inc.*, 931 F.Supp.2d 919, 930 (W.D. Wis. 2013) (“[T]he question is not how the defendant made a particular call, but whether the system it used had the “capacity” to make automated calls.”), vacated on other grounds, 2013 WL 5377280 (W.D. Wis., June 7, 2013).

⁴² *ACA Int’l v. FCC*, 885 F.3d 687, 698 (D.C. Cir. 2018).

⁴³ See *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050-1051 (9th Cir. 2018).

⁴⁴ See Babette Boliek, *Beating Back Unwanted Robocalls*, FCC Blog Post, June 5, 2019, available at <https://www.fcc.gov/news-events/blog/2019/06/05/beating-back-unwanted-robocalls>.

⁴⁵ WebRecon Stats for Dec 2019 and Year in Review: How Did Your Favorite Statutes Fare?, available at <https://webrecon.com/webrecon-stats-for-dec-2019-and-year-in-review-how-did-your-favorite-statutes-fare/>.

⁴⁶ WebRecon Stats for May 2020: Back to normal, sort of – everything is down, available at <https://webrecon.com/webrecon-stats-for-may-2020/>.

⁴⁷ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 8073 (2015) (Dissenting Statement of Commissioner Ajit Pai).

⁴⁸ Christian Hetrick, *Meet the Robocall Avenger: Andrew Perrong, 21, Sues Those Pesky Callers for Cash*, Philadelphia Inquirer, Nov. 2, 2018, available at <https://www.inquirer.com/philly/business/robocall-lawsuits-verizon-citibank-andrew-perrong-20181102.html>.

⁴⁹ See Declaratory Ruling and Third Further Notice of Proposed Rulemaking (FCC 19-51), June 6, 2019.

⁵⁰ See Combating Spoofed Robocalls with Caller ID Authentication, available at <https://www.fcc.gov/call-authentication>.

⁵¹ See FCC, FTC Demand Gateway Providers Cut Off Robocallers Perpetrating Coronavirus-Related Scams From United States Telephone Network, Press Release, Apr. 3, 2020, available at <https://docs.fcc.gov/public/attachments/DOC-363522A1.pdf>.

⁵² AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 397 (1999).